

HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HP TUNERS, LLC, a Nevada limited liability  
company,

Plaintiff,

vs.

KEVIN SYKES-BONNETT and SYKED  
ECU TUNING INCORPORATED, a  
Washington corporation,

Defendants.

) NO. 3:17-cv-05760-JRC

) **REPLY BRIEF IN FURTHER SUPPORT**  
) **OF MOTION TO MODIFY EXPERT**  
) **DISCLOSURE DEADLINES**

NOW COME Plaintiff HP Tuners, LLC (“HPT”) for its Reply Brief in further support of Motion to modify Expert Disclosure Deadlines entered in this case. In support thereof, Plaintiff states as follows:

1. Good cause exists to modify the expert disclosure deadline, or, alternatively, the scheduling order herein.

2. Defendants’ efforts to cast blame of Plaintiff for the progress of discovery are misplaced and not well founded.

3. Contrary to Defendants’ protestations, Defendants have stalled, hindered, delayed and obfuscated discovery to this point.

1           4.       With regard to the Protective Order, Defendants caused the delay concerning its  
2 entry and; therefore, the corresponding document production by the parties in this case.

3           5.       Contrary to Defendants' claims, the procedure history regarding the Protective  
4 Order issue is the following:

- 5                   a.   January 9, 2018 – By email, Mr. Whitaker advised counsel for HPT that  
6                       he would provide a draft of the Protective Order on January 9, 2018.
- 7                   b.   January 24, 2018 – By email, counsel for HPT requests an update on the  
8                       status of the draft Protective Order from Mr. Whitaker, which he had  
9                       advised would be provided on January 9, 2018 but had not been provided.
- 10                  c.   January 29, 2018 – Mr. Whitaker agrees that Defendants would produce  
11                       documents upon the entry of a Protective Order. Mr. Whitaker still had not  
12                       provided the draft which was promised.
- 13                  d.   February 1, 2018 – By email, counsel for HPT requests another update on  
14                       the status of the draft Protective Order from Mr. Whitaker.
- 15                  e.   February 4, 2018 – Mr. Whitaker finally provides a draft of the Protective  
16                       Order for counsel for HPT's review.
- 17                  f.   February 5, 2018 – The very next day, counsel for HPT provides  
18                       comments to the draft Protective Order in clean and redline format for Mr.  
19                       Whitaker's review.
- 20                  g.   February 5, 2018 – Mr. Whitaker responds that the proposed revisions to  
21                       the draft Protective Order from counsel for HPT are not agreeable.  
22                       Counsel for HPT responds immediately to Mr. Whitaker's email on that  
23                       day (2/5/18) to request his availability to discuss the issues raised by Mr.  
24                       Whitaker.
- 25

- 1 h. February 9, 2018 – By email, after conferring with Mr. Whitaker by  
2 phone, counsel for HPT provides a revised version of the draft Protective  
3 Order in clean and redline format for Mr. Whitaker’s review,
- 4 i. February 27, 2018 – More than two weeks later, Mr. Whitaker advises that  
5 he is agreeable to counsel for HPT’s revisions to the draft Protective Order  
6 which had been provided on February 9, 2018 and proposes some  
7 additional revisions.
- 8 j. March 1, 2018 – Counsel for HPT advises that he is agreeable to those  
9 additional revisions and requests that Mr. Whitaker finalize and file the  
10 Motion for Entry of Protective Order.
- 11 k. April 26, 2018 – By email, Counsel for HPT requests an update  
12 concerning Mr. Whitaker’s filing of the Motion for Entry of Protective  
13 Order, which he was supposed to file on or about March 1, 2018 – seven  
14 (7) weeks earlier.
- 15 l. May 3, 2018 – Tired of waiting on Mr. Whitaker to finalize and file the  
16 Motion for Entry of Protective Order, Counsel for HPT files the motion  
17 for entry of Stipulated Protective Order.
- 18 m. May 11, 2018 – By email, Counsel for HPT seeks agreement from Mr.  
19 Whitaker regarding an Amended Motion for Protective Order in response  
20 to issues raised by the Court.
- 21 n. May 14, 2018 – By email, in a follow up email to the May 11, 2018 email,  
22 Counsel for HPT seeks agreement from Mr. Whitaker regarding the  
23 Protective Order issue raised by the Court.
- 24 o. May 18, 2018 – By email, in a second follow up email to the May 11,  
25 2018 email because the May 11<sup>th</sup> and May 14<sup>th</sup> emails had been ignored,

Counsel for HPT seeks agreement from Mr. Whitaker regarding the Protective Order issue raised by the Court.

p. May 19, 2018 – By email, in a third follow up email to the May 11, 2018 email because the May 11<sup>th</sup>, May 14<sup>th</sup> and May 18<sup>th</sup> emails had been ignored, Counsel for HPT seeks agreement from Mr. Whitaker regarding the Protective Order issue raised by the Court.

q. May 21, 2019 – The Court entered the Protective Order.

6. Consequently, Defendants caused the 4-month plus delay in the entry of the Protective Order.

7. Moreover, obtaining discovery compliance has been equally as challenging as the Protective Order issue as Defendants have failed to comply with Plaintiff's discovery requests and produce requested documents.

8. On February 5, 2018, counsel for HPT sent an email to Mr. Whitaker regarding compliance issues in connection Defendants' responses to Plaintiff's First Requests for Production.

9. Despite numerous requests and communications to address the issues, as of June 4, 2018, Defendants had failed to remedy the various issues identified by counsel for HPT.

10. Thereafter, on June 4, 2018, counsel for HPT sent another email to Mr. Whitaker regarding Defendants' compliance with HPT's supplemental discovery requests.

11. Finally, on June 19, 2018, Mr. Whitaker made himself available for a meet and confer on the discovery issues. During that call, the parties agreed to an exchange of documents on July 13, 2018. While Mr. Whitaker disputes that such a discussion took place, counsel for HPT represents that an agreed upon exchange date was discussed.

12. As of June 19, 2018, Defendants compliance with written discovery was insufficient and incomplete, and remains insufficient and incomplete to date.

1           13.     Upon receipt of Defendants' production on July 13, 2018, Plaintiff immediately  
2 conducted an extensive review of the production to discover that the production is insufficient  
3 and incomplete in several material respects.

4           14.     Counsel for Plaintiff promptly requested a meet and confer which Mr. Whitaker  
5 initially ignored.

6           15.     Finally, after follow up communications, Mr. Whitaker agreed to participate in a  
7 meet and confer, which is scheduled for July 30, 2018 because Mr. Whitaker was not available  
8 until that week.

9           16.     Contrary to Defendants' claims, Plaintiff could not proceed with the discovery  
10 depositions of Defendants prior to receipt of the document production.

11           17.     Therefore, Defendants' contentions that depositions could have proceeded earlier  
12 is without merit. However, Defendants' delays in document production and discovery  
13 compliance have prevented the depositions from going forward to this point. Moreover, despite  
14 requests to proceed with the depositions in August or September, Defendants are not available  
15 until September 25<sup>th</sup> and September 26<sup>th</sup> for depositions – two months from now.

16           18.     As such, any claimed issues or prejudice as a result of the modification of the  
17 schedule are not well founded as substantial discovery remains to be completed.

18           19.     Defendants also misstate the issue concerning the inspection of Defendants'  
19 software. In connection with the June 19, 2018 meet and confer, counsel for HPT discussed an  
20 exchange of software with Mr. Whitaker.

21           20.     Mr. Whitaker has failed to respond to several follow up communications  
22 regarding this issue as HPT contemplated an exchange of the software not an inspection.  
23 Plaintiff intends to once again address this issue in connection with the July 30<sup>th</sup> meet and confer.  
24  
25

23. It is extremely prejudicial to penalize where Defendants' tactics and non-compliance has caused the delays in written and oral discovery.

24. Defendants' compliance with discovery is necessary to proceed with the depositions and expert discovery.

25. There is no prejudice to Defendants in connection with a modification of the expert discovery schedule and/or the scheduling order.

26. For the reasons set forth herein, the expert disclosure deadlines should be modified. In the alternative, an amended scheduling order should be entered in this matter.

WHEREFORE, Plaintiff respectfully prays for an order extending the Expert Disclosure Deadline and the Rebuttal Expert Disclosure Deadline be extended to October 15, 2018 and November 15, 2018, respectively. In the alternative, an Amended Scheduling Order should be entered in this matter.

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*Attorneys for HP Tuners, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 30, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all Counsel of Record.

HEURLIN, POTTER, JAHN, LEATHAM,  
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